

[1] **A.** The settlement agreement in the very first two pages, is
[2] that what you were discussing?
[3] **Q.** Yes. I may be mistaken here. Let me just check with my --
[4] no. Pardon me, if you look at the third -- the second whereas
[5] clause on page 1 of the settlement agreement.
[6] **A.** Second -- okay.
[7] **Q.** If you'd read it you see it covers a time period commencing
[8] January 1, 1994 through and including June 30, 2004?
[9] **A.** Yes, I do.
[10] **Q.** Does that refresh you that that retroactive period was
[11] identical to the period resolved with Muzak?
[12] **A.** Yes, it was.
[13] **Q.** And am I correct that that period was resolved in the same
[14] fashion as the Muzak retroactive period was resolved, by
[15] finalizing what had been the pre-existing interim fee payment
[16] levels, correct?
[17] **A.** Yes, sir.
[18] **THE COURT:** Whenever you get to a good point to stop,
[19] Mr. Rich.
[20] **MR. RICH:** Fine. Your Honor, let me -- this is as
[21] good as any.
[22] **THE COURT:** Okay. Let's resume at 10:00 tomorrow
[23] morning.
[24] **MR. RICH:** Your Honor, may we have the standard
[25] instruction to witnesses who are on cross not to discuss their

[1] testimony overnight?
[2] **THE COURT:** Mr. Fitzpatrick nods his agreement.
[3] **MR. FITZPATRICK:** I agree your Honor, thank you.
[4] **THE COURT:** For those of you who were at the pretrial
[5] conference Friday, the word that Napoleon was using is reform.
[6] So reform, reform. Don't speak to me of reform. Aren't things
[7] bad enough as they are?
[8] **MR. FITZPATRICK:** Thank you, your Honor.
[9] **THE COURT:** See you tomorrow morning.
[10] (Adjourned to January 20, 2010 at 10:00 a.m.)
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In The Matter Of:

*BROADCAST MUSIC INC., v.
DMX, INC.,*

January 20, 2010

*TRIAL
SOUTHERN DISTRICT REPORTERS
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01KFEMI1 Trial
[1] UNITED STATES DISTRICT COURT
[2] SOUTHERN DISTRICT OF NEW YORK
[3] -----X
[4] BROADCAST MUSIC INC.,
[5] Petitioner,
[6] v. 08 Civ. 216 (LLS)
[7] DMX, INC.,
[8] Respondent.
[9] -----X
[10] January 20, 2010
10:10 p.m.
[11] Before:
[12] HON. LOUIS L. STANTON,
[13] District Judge
[14] APPEARANCES
[15] HUGHES, HUBBARD & REED, LLP
Attorneys for Petitioner
[16] BY: JAMES C. FITZPATRICK
MICHAEL E. SALZMAN
JASON C. BENTON
MARGARET J. HOAG
[17] - AND -
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[19] WEIL, GOTSHAL & MANGES, LLP
Attorneys for Respondent
[20] BY: R. BRUCE RICH
BENJAMIN E. MARKS
[21] TODD D. LARSON
[22]
[23]
[24]
[25]

[1] yesterday that it not dissimilar to the Muzak agreement covered
[2] a retroactive period which was identical to the retroactive
[3] period of the Muzak agreement, is that correct?
[4] A. That's correct.
[5] Q. And a forward-operating period identical to that of the
[6] Muzak agreement as well, yes?
[7] A. Yes, sir.
[8] Q. Okay, now, at the time in or about the time that this
[9] license was entered into, am I correct that Music Choice and
[10] BMI had been engaged for some period of years in rate court
[11] litigation?
[12] A. Yes, sir.
[13] Q. That wasn't about the commercial services, it was about the
[14] residential services offered by Music Choice, is that correct?
[15] A. Yes.
[16] Q. And something like eight years of litigation?
[17] A. I guess it started in '98, roughly, so --
[18] Q. Long period of time?
[19] A. Yes.
[20] Q. And I take it you would agree was costly litigation, yes?
[21] A. Yes.
[22] Q. I take it it's also the case that for that period of time
[23] at least, the residential side of Music Choice's business was a
[24] more important component of its overall business than its
[25] commercial side, is that true?

[1] (Case called)
[2] (Trial resumed)
[3] MICHAEL O'NEILL,
[4] called as a witness by the Plaintiff,
[5] having been previously duly sworn, testified as follows:
[6] THE COURT: Good morning. Good morning, Mr. O'Neill,
[7] you are reminded you are still under oath.
[8] THE WITNESS: Yes, your Honor.
[9] THE COURT: Mr. Rich?
[10] CROSS-EXAMINATION
[11] BY MR. RICH:
[12] Q. Good morning, Mr. O'Neill.
[13] A. Good morning.
[14] Q. When we left off yesterday afternoon we were discussing the
[15] BMI Music Choice agreement. Do you remember that?
[16] A. Yes.
[17] Q. I put in front of you and I think you will find in your
[18] manila folder a document in evidence Joint Exhibit 1310
[19] commemorating that agreement, correct?
[20] A. Yes, sir.
[21] Q. That agreement, just to reiterate, was entered in the
[22] middle of June or towards the end of June 2006, is that
[23] correct?
[24] A. Yes.
[25] Q. And I believe it was established just at the close

[1] A. I think Music Choice generated more revenues from the
[2] residential side than they did from the commercial side.
[3] Q. Around about the same time as this set of agreements was
[4] entered into or this agreement was entered into that you have
[5] in front of you, I take it, the parties also, that is, Music
[6] Choice and BMI, were able to resolve the residential side
[7] license issues, is that also correct?
[8] A. I believe so, yes.
[9] Q. Now, coming back to this agreement, the 2006 agreement on
[10] the commercial music service side, the retroactive period left
[11] the interim fees that Music Choice had been paying for its
[12] commercial music service unchanged; there was no -- there were
[13] no additional monies paid, correct?
[14] A. Correct.
[15] Q. And no interest payments were made, correct?
[16] A. Correct.
[17] Q. No additional consideration of any kind for that portion of
[18] the resolution, is that right?
[19] A. Either way, correct.
[20] Q. And those interim fees were at the same level that Muzak
[21] had been paying and later finalized with BMI, is that correct?
[22] A. Yes, they operated under, again, it was under the same
[23] contract. Their fees may have been a little different because
[24] of the way it was calculated, but we finalized what they
[25] operated with under the contract.

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[1] **Q.** Right. And it was pursuant to the old rate schedule,
[2] pre-existing rate schedule that had been in place for many
[3] years, correct?

[4] **A.** Correct.

[5] **Q.** Now, with respect to the license agreement, that is, the
[6] portion of the resolution with Music Choice beginning for the
[7] period July of 2004, that agreement also was patterned after
[8] the Muzak agreement, yes?

[9] **A.** Yes.

[10] **Q.** Okay, and so like the Muzak agreement, the Music Choice
[11] license allows for a certain amount of organic growth in
[12] customer locations without there being any upward adjustment to
[13] the Music Choice fees, correct?

[14] **A.** Correct.

[15] **Q.** And that amount was 8 percent per annum?

[16] **A.** Yes, it was.

[17] **Q.** And I take it that growth above 8 percent in any year would
[18] result in Music Choice being required to make additional
[19] payments to BMI with respect to those excess locations, but
[20] that the effective rate that would be paid would result from
[21] dividing the base fee of the license by the maximum allowable
[22] locations for that year, is that correct?

[23] **A.** Yes. That is correct.

[24] **THE COURT:** What does maximum allowable locations for
[25] that year mean?

[1] but \$33.67 after that first year, having reached the maximum
[2] allowance. That's how the math works out.

[3] **THE COURT:** Yes. Just what you'd think, actually,
[4] from the function of the 8 percent cushion.

[5] **MR. RICH:** Precisely. And each year, your Honor, the
[6] incremental fees, if there were, because the maximum allowance
[7] would be exceeded, would be payable at each of those reported
[8] levels of per location fee. So, for example, in the TruSonic,
[9] in the Play Network --

[10] **THE COURT:** That 33.67 would never be altered, even if
[11] the number of locations doubled in a year.

[12] **MR. RICH:** In that year.

[13] **THE COURT:** All of those over 8 percent would still
[14] pay 33.67.

[15] **MR. RICH:** And if you grew by more than 8 percent in
[16] each year of the license, as did Play Network and TruSonic, it
[17] would also follow that in year five all of the excess would be
[18] payable at the level of \$24.75. We have to spend as much time
[19] on this as necessary, because this is critical.

[20] **THE COURT:** What is the base figure for the second
[21] year?

[22] **MR. RICH:** The base figure will vary in each contract
[23] depending on the starting stipulated location count. For
[24] Muzak --

[25] **THE COURT:** But it will always be at the rate of

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[1] **MR. RICH:** Can we put back what was the first
[2] demonstrative from my opening, please, so I can respond to the
[3] Court?

[4] Your Honor, in each contract you will find stipulated
[5] from a, starting -- for example, let's come back to the Muzak
[6] agreement for a moment. You'll remember the number 165,000
[7] locations, your Honor, was the starting number?

[8] **THE COURT:** I do.

[9] **MR. RICH:** Each year there was set forth in these
[10] agreements a number of locations which represents 8 percent
[11] growth, assumed growth from the 165, so that -- I'm making this
[12] up for the purpose of illustration -- if Muzak were allowed by
[13] the end of the first year to grow to something like 172,000
[14] locations, that is the maximum allowable locations for that
[15] year. And so the \$33 --

[16] **THE COURT:** You mean the maximum allowable without
[17] payment of an additional fee.

[18] **MR. RICH:** That's correct.

[19] **THE COURT:** This would be the 8 percent cushion. It's
[20] the upper dimension of the 8 percent cushion.

[21] **MR. RICH:** That's correct. So let's assume that Muzak
[22] grew by an additional, or Music Choice grew 1000 locations
[23] beyond the maximum locations allowable. The point of my last
[24] question was to elicit the mathematical proposition that those
[25] thousand additional locations would pay a fee not of \$36.36,

[1] the -- let's say they double in year one.

[2] **MR. RICH:** Yes.

[3] **THE COURT:** So everything over 8 percent had to be
[4] paid for at 33.67.

[5] **MR. RICH:** That is correct.

[6] **THE COURT:** Then the base figure for year two would be
[7] 33.67 and there would be an 8 percent cushion as in year one
[8] before it moved to 31.18, is that correct?

[9] **MR. RICH:** Mathematically the effect would be --

[10] **THE COURT:** No, I'm trying to figure out the operation
[11] of the base figure. Would that apply to the whole doubled
[12] figure?

[13] **MR. RICH:** No, your Honor --

[14] **THE COURT:** Population.

[15] **MR. RICH:** No. The way each year the fee would be
[16] determined would be to take the original base fee, in the case
[17] of Muzak, \$6 million --

[18] **THE COURT:** That's 36.36.

[19] **MR. RICH:** That's correct. Look at for the given year
[20] the maximum allowable locations, so that in year two, your
[21] Honor -- we ought to pull the Muzak agreement, so we don't need
[22] to be hypothetical about this. In year two, your Honor, the
[23] maximum allowable locations for Muzak -- we'll look at that in
[24] a minute -- were something greater than in year one, was
[25] 180,000 locations, let's say. We'll get you the year numbers.

[1] Taking your example, if Muzak in year one mushroomed to 300,000
[2] locations, your math is exactly right for year one, they would
[3] have paid for the difference between the allowable for the
[4] first year -- I'm looking at JX132, which is the Muzak
[5] agreement, which I think is in the binder as well.

[6] **THE COURT:** Just tell me how it works.

[7] **MR. RICH:** Okay. Your Honor, for the first, I'm just
[8] getting the actual numbers. Give me one moment, please.

[9] **THE COURT:** In the year two you start with an actual
[10] number of locations under your example.

[11] **MR. RICH:** You do.

[12] **THE COURT:** 300,000.

[13] **MR. RICH:** And you subtract from that the maximum
[14] allowable locations for that year, whether it's year one, two,
[15] three or five, four or five. That number of locations grows
[16] each year under the contract, so you would subtract from our
[17] hypothetical 300,000 the maximum allowable locations, say, in
[18] year two, and that would yield X number of locations. Let's
[19] say it yielded 100,000 locations over and above the allowable
[20] for that year, your Honor, and in that situation, here on the
[21] screen is an excerpt from the Muzak agreement. What paragraph
[22] is that, please? The end of paragraph 4H, your Honor, you will
[23] see for --

[24] **THE COURT:** Do each of these figures in this clause
[25] that you're displaying represent successive 8 percent additions

[1] to the original starting base figure?

[2] **MR. RICH:** Yes. If you were to -- if you see the
[3] number \$192,000 and change, your Honor?

[4] **THE COURT:** I do.

[5] **MR. RICH:** That is the mathematical -- locations,
[6] thank you.

[7] **THE COURT:** 165 plus 8.

[8] **MR. RICH:** Now if you go to 207,000 for the next year?

[9] **THE COURT:** That's 192,000 plus 8 percent.

[10] **MR. RICH:** Exactly. So in your example --

[11] **THE COURT:** I understand the process.

[12] **MR. RICH:** So just in year two, so I think the record
[13] will be clear and I'd like to make sure our witness agrees with
[14] our interpretation. If there were 300,000 Muzak locations with
[15] respect to the year 2006-2007 --

[16] **THE COURT:** Yes.

[17] **MR. RICH:** They would pay \$6 million to cover the
[18] first 207,852 of those, and then if we could flip back to the
[19] demonstrative, please, for the remaining approximately 92 or
[20] 93,000, they would pay at the second year rate, your Honor, of
[21] \$31.18 for the balance.

[22] **THE COURT:** And the growth of the next 8 percent would
[23] be paid for at 31.18, and after that would be paid for at
[24] 33.67?

[25] **MR. RICH:** No. That 33.67 would be history at that

[1] point. In other words, the bottom line each year is that if
[2] you are growing at or above the 8 percent, your maximum, your
[3] effective rate will be exactly per every location, exactly what
[4] this chart depicts from location one. So that in year five,
[5] your Honor, Play Networks for every single location because it
[6] had grown by more than 8 percent each year, under the contract
[7] paid exactly \$24.75 to BMI for every single one of its
[8] locations from the first. 36.36 was a shadow of history.

[9] **THE COURT:** Okay.

[10] **MR. RICH:** Just how it works.

[11] **THE COURT:** Is that accurate, Mr. O'Neill?

[12] **THE WITNESS:** It's acc -- the way I look at it, if you
[13] took \$6 million the first year divided by 165,000 locations,
[14] you would get the 36.36. They have 8 percent to grow as the
[15] cushion the next year or actually that year. You would get
[16] 192,000 locations. If you simply divided 6 million by 192, you
[17] would end up at the 33.67. That's effectively what they would
[18] pay for those locations. If they grew over that 8 percent,
[19] they would pay each additional location that 33.67. The next
[20] year, you take the \$6 million and they have the ability to grow
[21] another 8 percent.

[22] **THE COURT:** The disciplining figure is the 6 million.

[23] **THE WITNESS:** Correct. That's why it gets added to
[24] that 6 million. So, yes, I agree with the math.

[25] **MR. RICH:** Thank you.

[1] **THE COURT:** The business purpose was to get the
[2] \$6 million and the calculation we're performing is really a
[3] secondary and collateral one to determine a rate as part of
[4] this argument?

[5] **THE WITNESS:** Yes. The \$6 million was guaranteed each
[6] year and that was a floor, if you will, or hence a base fee
[7] that we couldn't fall below.

[8] **THE COURT:** With additions compensated at a
[9] diminishing rate because of the increasing number.

[10] **THE WITNESS:** Correct.

[11] **THE COURT:** Yes.

[12] **MR. RICH:** May I proceed, your Honor?

[13] **THE COURT:** Yes, please.

[14] **MR. RICH:** Thank you.

[15] **BY MR. RICH:**

[16] **Q.** Now, the Music Choice agreement we were discussing was
[17] entered mid-2006, yes?

[18] **A.** Yes, sir.

[19] **Q.** And, however, it had applicability back as early as
[20] mid-2004, is that correct?

[21] **A.** Yes, July 1.

[22] **Q.** So it had, that agreement itself had a slight retroactive
[23] feature in terms of its date of first coverage, correct?

[24] **A.** Yes.

[25] **Q.** Prior to the date of execution?

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- [1] A. Yes.
- [2] Q. Now, in fact, Music Choice's growth in that first year of
- [3] the license, namely, from July of 2004 to June of 2005, okay,
- [4] that actually exceeded 8 percent to your recollection, yes?
- [5] A. Yes, it did.
- [6] Q. Okay, and that, therefore, resulted in the very first year
- [7] of the license which was executed in 2006 in a first year per
- [8] location effective rate of not 36.36 but 33.67, is that
- [9] correct?
- [10] A. Yes, sir.
- [11] Q. And indeed, given that timing, namely, that this was a
- [12] determination as to growth which had occurred prior to the
- [13] execution of the license, at the time the license was entered
- [14] into, BMI knew and understood, did it not, that even the first
- [15] year of the license would be payable by Music Choice at a rate
- [16] less than \$36.36, correct?
- [17] A. Yes. What governed our belief was the fact they were
- [18] similarly situated. We had to offer them the same contract
- [19] that Muzak had or anybody else had signed. Even if the rate
- [20] fell, that was what the contract called for.
- [21] Q. But the narrow answer to my question is, yes, BMI knew that
- [22] as of the date it entered into the license it would be
- [23] receiving from the first year from Music Choice a fee on a per
- [24] location basis less than \$36.36, correct?
- [25] A. On a per location basis, yes.

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- [1] Q. Now, it's also the case, isn't it, that Music Choice's
- [2] locations continued to grow over the term of the license?
- [3] A. Yes, they did.
- [4] THE COURT: But your point is it wasn't a free choice
- [5] because you were bound to offer them the same as you had
- [6] already offered to Muzak?
- [7] THE WITNESS: Absolutely.
- [8] Q. And the reason you were bound is what?
- [9] A. The similarly situated.
- [10] MR. RICH: Could I explore that a moment, your Honor?
- [11] THE COURT: Sure.
- [12] Q. What would prevent you from offering more preferable to the
- [13] user economic terms as opposed to more discriminatory against
- [14] the user economic terms to a subsequent licensee in an
- [15] industry?
- [16] MR. FITZPATRICK: Your Honor, I object to the extent
- [17] it calls for a legal conclusion. Although Mr. O'Neill can give
- [18] his own opinion.
- [19] THE COURT: It does call for a legal conclusion, but
- [20] it is one very well within Mr. O'Neill's province.
- [21] A. Could you repeat the question?
- [22] Q. Yes. My question is, is it your understanding that BMI is
- [23] legally constrained from offering any better license terms to a
- [24] user in an industry where it has licensed any prior users at a
- [25] given rate?

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- [1] A. No, I think it's incumbent upon BMI to determine if that
- [2] user is similarly situated to others that are already operating
- [3] under a final license. If we believe they are similarly
- [4] situated, meaning their operations are similar, their music use
- [5] which they make available is similar, their mode of operation,
- [6] delivery of their product is similar, if they're competing
- [7] against these people that have signed the final license
- [8] agreement on a daily basis for the same customers, then we
- [9] would determine at that point in time that they should be
- [10] treated similarly as everybody else in the industry.
- [11] Q. My question is a little more narrow than that. Let's take
- [12] two separate situations, just to explore your understanding of
- [13] the scope of your leeway as head of licensing, okay? Let's
- [14] assume that you licensed radio station X, commercial radio
- [15] station X at a percentage of its revenues equaling 1.7 percent
- [16] of its advertising revenues, okay? Let's say you licensed 100
- [17] radio stations, each of them at a rate of 1.7 percent of their
- [18] advertising revenues, okay? Are you with me so far?
- [19] A. Yes.
- [20] Q. Now, a new radio station comes on the air and needs a
- [21] license from BMI. And BMI says, well, we don't really like the
- [22] 1.7 percent, it's not enough. I think we should license the
- [23] new station at 2 percent, okay? I take it you understand your
- [24] requirement not to discriminate between similarly situated
- [25] users as preventing BMI from issuing a license that is

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- [1] detrimental or discriminatory against that later station,
- [2] correct?
- [3] A. Yes, assuming again --
- [4] Q. Assuming they're comparably situated?
- [5] A. Assuming they're comparably situated, as I answered a
- [6] minute ago, I would treat them at the 1.7 rate.
- [7] Q. Indeed, you believe you could not do otherwise, correct?
- [8] A. I don't think it would be right to do otherwise.
- [9] Q. But now let's take a situation where you got those hundred
- [10] stations licensed at 1.7 percent, okay?
- [11] A. Mm-hmm.
- [12] Q. And a new station comes along and you say I think it's time
- [13] to make a gesture in favor of the radio industry. As we've
- [14] thought about it, 1.7 is too high, in fairness. We're prepared
- [15] to license this new fella at 1.5 percent, okay, that's
- [16] otherwise similarly situated, in terms of music use, right?
- [17] A. Yes.
- [18] Q. You could do that, couldn't you?
- [19] A. Only if I lowered everybody else that was on the 1.7 to the
- [20] 1.5.
- [21] Q. You could do that, right?
- [22] A. I could do that.
- [23] Q. That's a business decision not to, correct?
- [24] A. Again, if I felt the one-five was the proper rate for that
- [25] station and that station was similarly situated to the stations

[1] that were paying one-seven, I could not allow those stations to
[2] continue to pay one-seven when I just issued a license for
[3] one-five.
[4] **Q.** You're saying that as a matter of business practice or as a
[5] matter of your understanding of the decree or a matter of your
[6] understanding of the contracts?
[7] **A.** As a matter of my understanding as the head of licensing
[8] what my responsibilities are regarding the concept of similarly
[9] situated.
[10] **Q.** So you're saying as a matter of fairness?
[11] **A.** As a true example, when the contract that we're talking
[12] about for Muzak and 164 other licensees expired on June 30 of
[13] 2009, they were paying effectively, as we saw earlier, \$34
[14] across the spectrum of licenses per location. Each of those
[15] stations requested the \$25 interim rate that the Court set for
[16] DMX, and BMI felt they were similarly situated, so we lost
[17] three and a half million dollars on that decision, but we had
[18] to lower their fees on an interim base to match the \$25.
[19] **Q.** That was my first example; you had to, correct?
[20] **A.** We believed it. Nobody forced us to do so, but we believed
[21] they were similarly situated.
[22] **Q.** Well, we won't debate the law because as your counsel
[23] indicated and his Honor appreciates, you're not a lawyer. But
[24] I would submit to you that in the second example, the only
[25] constraint that BMI has against lowering its fee to a given

[1] year is whatever business judgment BMI decides to make as to
[2] what its impact might be on its future licensing with all of
[3] the other members of that industry, isn't that correct?
[4] **A.** I think that's fair, that's one of the assessments we would
[5] look at.
[6] **THE COURT:** What is your answer?
[7] **THE WITNESS:** Yes. I'd consider the impact across the
[8] whole industry on whether I go up or go down.
[9] **THE COURT:** Well, he says, his question I think is
[10] asking you whether you could lower the rate to the new entrant
[11] who is similarly situated to the existing population without
[12] lowering it also to the existing population.
[13] **THE WITNESS:** Again, in this hypothetical I would have
[14] a difficult time doing this and passing the straight-faced test
[15] with the other licensees.
[16] **THE COURT:** What is the position of BMI about the law
[17] applicable to that question?
[18] **MR. SALZMAN:** One thing I would point out that hasn't
[19] been discussed about this is there's a proviso in that
[20] similarly situated paragraph which says provided that due to
[21] changes in market conditions from time to time BMI may make
[22] changes in rates and terms so that proviso would have to be
[23] taken into account along with the similarly situated stricture.
[24] If the new rate were as a result of changes in business
[25] conditions, while other people had signed two years earlier for

[1] a five-year term, that proviso may very well give BMI the
[2] leeway, or I think probably does give BMI the leeway if there
[3] were changes in market conditions to say, well, that would
[4] explain a new person coming along for a new period, not for a
[5] retroactive period, but for a new period, forward looking,
[6] getting a different rate.
[7] **THE COURT:** Without changing the rate earlier entered
[8] into by others under different business conditions.
[9] **MR. SALZMAN:** Correct.
[10] **MR. RICH:** Your Honor, I would submit BMI has far more
[11] discretion than that. If you were to conclude otherwise, you
[12] would literally have a situation where BMI, having entered into
[13] a license with a commercial music service of the type I'll put
[14] up on the screen in a few minutes, where the effective rate is
[15] \$600 a location, a little guy, literally adopting the view that
[16] that would bind BMI, using it as a sword, as it were, or as a
[17] shield by BMI here rather than a protective measure for users,
[18] if you were construe Article 8A of the decree as an offensive
[19] tool for use by BMI, then BMI would take that \$600 a location
[20] licensee and profess to be unable to vary downward with any
[21] other licensee, lest it violated its consent decree. That's
[22] plainly not the purpose of that provision, which is to avoid
[23] BMI from deviating upwards from pre-existing rates to
[24] discriminate against future licensees. But there surely is no
[25] injunction against BMI on a forward-looking basis adjusting its

[1] rates downward.
[2] It would also make a mockery of a rate court case. We
[3] have numerous rate court proceedings with BMI and with ASCAP
[4] where adjustments are made industry wide. There is no issue
[5] that that's smacking up against non-discrimination provisions.
[6] BMI is entitled to make a business judgment that it doesn't
[7] want to offer a DMX or somebody a lower rate because inevitably
[8] when those next licenses come forward for renewal, they would
[9] need to offer the rest of the industry that rate, which is what
[10] happened effectively once your interim fee was put in.
[11] Prospectively, what Mr. O'Neill says is surely true, they can't
[12] hold out two levels of license fees that discriminate, but
[13] going forward, they have infinite flexibility as a business
[14] organization to decide to lower their rates, simply recognizing
[15] that the future effect will be to bring down that rate
[16] structure for the industry.
[17] There is nothing that you would find, there's no most
[18] favored nation clause that I'm aware of in the license
[19] agreements we're examining. I'm not aware that for the term of
[20] the licenses that expired in June of 2009 Muzak or anybody else
[21] could say if you gave a better rate to TruSonic, which in fact
[22] they did, we get the benefit of it for this license period.
[23] But going forward, if Muzak, for example, were to come into
[24] this Court and demonstrate and your Honor were to determine
[25] that the effective rate for TruSonic was in fact more favorable

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[1] than that which Muzak had entered into, the proper remedy would
 [2] be to say going forward, Muzak, you get the benefit of that
 [3] rate because BMI is not allowed under Article 8A of its decree
 [4] to discriminate in fees. And that's in fact how the licensing
 [5] societies have operated forever.

[6] **THE COURT:** And does going forward mean from that
 [7] moment on or from the expiration of the pending lease?

[8] **MR. RICH:** Expiration of the pending licenses.

[9] **THE COURT:** In your view.

[10] **MR. RICH:** In my view.

[11] **BY MR. RICH:**

[12] **Q.** I want to just clean up what appears to us to be a data
 [13] anomaly in one of the joint exhibits that was prepared by BMI,
 [14] Mr. O'Neill. Can we put up the Music Choice lines coming from
 [15] JX1293, your Honor? That's that big chart, the blowup that
 [16] appeared in the direct examination booklet at tab 5. To save
 [17] everybody the eye -- is that the best we can do it?

[18] **Mr. O'Neill,** if you'll look at the actual locations
 [19] column highlighted in the second or third column, am I correct
 [20] that it shows year over year growth for each of the five years?
 [21] If it's easier, you can look at the screen.

[22] **A.** I'm not quite sure if this is -- is this the same licensee,
 [23] Mr. Rich?

[24] **Q.** This is Music Choice.

[25] **A.** You consolidated --

[1] now for some time are structured, how the effective rate could
 [2] jump back up in that middle year.

[3] **A.** The organic surplus grows in that year versus -- so those
 [4] organic surplus, maybe it was growing at that higher rate,
 [5] Mr. Rich, from the previous year?

[6] **Q.** It would take more math than you would try to solve here?

[7] **A.** Now. But that's what I assume happened.

[8] **Q.** I just wanted to observe. It struck me as an anomaly.

[9] Obviously, it's not an enormous matter in the case, but I
 [10] wanted to see if you had an explanation about why that would
 [11] be?

[12] **A.** Again, the base fee doesn't change from the 953. The only
 [13] thing that changes is the organic growth number. Then we were
 [14] dividing that by the total license fees. That's the only thing
 [15] I could assume.

[16] **MR. RICH:** Could we put this demonstrative back up
 [17] from yesterday?

[18] **Q.** Now, yesterday, when we discussed Play Network, we talked
 [19] about the economics of that deal reflected in the first row of
 [20] this demonstrative, correct?

[21] **A.** Yes, sir.

[22] **Q.** That proved to be the per location count for Play Network
 [23] over the five years.

[24] **A.** Yes, it was.

[25] **Q.** Now we just talked about Music Choice and pulling from

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[1] **Q.** We pulled the year-by-year lines for Music Choice for the
 [2] purposes of demonstrating and just condensed them here. Can
 [3] you push it over so we can see the start years? Jacob?
 [4] There's the beginning, okay, five through nine, and now let's
 [5] scroll back, please? All right. And do you see that it
 [6] reports location growth each year?

[7] **A.** Yes, sir.

[8] **Q.** Okay. Now, if you look at the farthest most column, R, it
 [9] translates it into effective per location rates. Do you see
 [10] that?

[11] **A.** Yes, I do.

[12] **Q.** And it goes from 33 and change to 31 and change to 28 and
 [13] change and then jumps up to 29 and change and back down to 27.
 [14] Does that strike you as an error? Shouldn't there be
 [15] progressively lower per location fees given the steady increase
 [16] in location?

[17] **A.** Can you slide the screen back a little bit?

[18] **Q.** Sure.

[19] **A.** Right there is good. Thank you. It looks like the actual
 [20] locations grew by only a couple of hundred locations, so I
 [21] don't have my calculator on me to do the division, but I'm sure
 [22] you have.

[23] **Q.** No, actually, we haven't. It just struck us we couldn't
 [24] understand a scenario where there was persistent growth but
 [25] where the effective, as these licenses we've been discussing

[1] those same lines, from JX1293 we depict in the second row what
 [2] these numbers are, including what we think may be that small
 [3] anomaly, okay? That's what I'm showing you there, correct?

[4] **A.** That is.

[5] **Q.** So those were the effective year-by-year per location fees
 [6] paid by Music Choice according to BMI's business records,
 [7] correct?

[8] **A.** Yes, it is.

[9] **Q.** And BMI regards the Music Choice deal as a reasonable one,
 [10] right?

[11] **A.** Yes, we do.

[12] **Q.** And recognizes that DMX is entitled to a license on
 [13] comparable economic terms to Music Choice, correct?

[14] **A.** Yes, we do.

[15] **Q.** Okay, let's turn to TruSonic now if we can. TruSonic
 [16] entered a license with BMI in or about June of 2007, is that
 [17] correct?

[18] **A.** I believe that is correct.

[19] **Q.** And I believe that's in the book which Mr. Fitzpatrick had
 [20] a series of exhibits on, although he may have skipped over
 [21] discussion of this, and if I'm correct it appears at tab 10 to
 [22] the direct exhibits binder. Do you see that?

[23] **A.** Yes, I do.

[24] **Q.** And that is in fact as you recognize it, that's in evidence
 [25] as JX0127. Do you recognize that as the June 2007 TruSonic

[1] agreement?
[2] **A.** Yes, I do.
[3] **Q.** And this agreement was structured the same way as the Muzak
[4] and Music Choice agreements, correct?
[5] **A.** Yes, it is.
[6] **Q.** And it has that 8 percent organic growth provision, right?
[7] **A.** Yes, it does.
[8] **Q.** In fact, TruSonic also experienced growth exceeding
[9] 8 percent during all of the years of the contract, correct?
[10] **A.** That is correct.
[11] **Q.** And in fact, our third row here, pulling from JX1293,
[12] again, the TruSonic lines sets forth the year-by-year per
[13] location rates, which I'll represent to you accurately reflect
[14] what's on JX1293.
[15] **A.** That is correct.
[16] **Q.** Does that look about right to you?
[17] **A.** Yes it does.
[18] **Q.** Is 24.74 a rounding error or did they get an extra penny?
[19] **A.** That's a good question. I don't know. My guess would be
[20] it's a rounding error.
[21] **Q.** And because of this growth, it's also the case that
[22] TruSonic never paid 36.36 a location, correct?
[23] **A.** Ultimately, no, not per location.
[24] **Q.** And BMI knew as of June 2007 when this agreement was
[25] executed that TruSonic would never pay 36.36, isn't that

[1] correct?
[2] **A.** Yes. We knew those effective rates.
[3] **Q.** You testified yesterday just over one more tab in the
[4] direct binder about the amendment entered into with TruSonic?
[5] **A.** Yes.
[6] **Q.** That had to do with the circumstance in which
[7] establishments might offer solely directly licensed music?
[8] **A.** Correct.
[9] **Q.** And I understood the import of that amendment to be to
[10] permit TruSonic to exclude from the location counts, which goes
[11] into driving these location fees, such establishments as might
[12] have all of their music directly licensed, correct?
[13] **A.** That is correct.
[14] **Q.** Now, BMI secured no additional consideration from TruSonic
[15] in return for this agreement, did it?
[16] **A.** No, we did not.
[17] **Q.** And the amendment appearing at JX 1312 calls for no
[18] additional fees to cover any costs that might be incurred by
[19] BMI due to this allowance, is that correct?
[20] **A.** We didn't believe there would be any additional costs
[21] incurred. Basically, they're requesting not to license
[22] establishments.
[23] **Q.** Conceivably you could have needed to monitor to see if they
[24] were accurate, yes?
[25] **A.** Conceivably we could have. If they weren't licensed, they

[1] weren't licensed. If we found somebody infringing, we had the
[2] ability to sue for copyright infringement, but in our mind, it
[3] was as if they were playing news talk that used no music at all
[4] in that establishment, we wouldn't have to license that
[5] establishment.
[6] **Q.** But you're not in the habit of necessarily taking a
[7] licensee's word for it that it's not using any BMI music, are
[8] you?
[9] **A.** I would say we verify when needed.
[10] **Q.** That has a cost associated with it, correct?
[11] **A.** Yes, it did.
[12] **Q.** But you didn't attempt to monetize or create any estimate
[13] of what those costs might be if in fact TruSonic exercised the
[14] rates granted it under this amendment, is that correct?
[15] **A.** No, we didn't.
[16] **THE COURT:** Let me just as a matter of curiosity ask
[17] you about the TruSonic figures. Are they rounding errors?
[18] Fairly consistently the TruSonic fee is a penny or so less. In
[19] 2004 to five it's 66 cents instead of 67. In 2005 into '06
[20] it's, curiously enough, two pennies more. In 2007 and 2008
[21] it's a penny less. There's some sort of fluctuation affecting
[22] TruSonic?
[23] **THE WITNESS:** Yes. I don't know if it's an actual
[24] rounding error, but I believe that would be the case. Could be
[25] just the odd number of locations when you're dividing it into

[1] the actual.
[2] **THE COURT:** It jumps the number up or down. Okay.
[3] **THE WITNESS:** But I believe it operated exactly the
[4] same as the Play Network agreement. It was just a rounding
[5] issue.
[6] **BY MR. RICH:**
[7] **Q.** I have just a few more general questions, Mr. O'Neill,
[8] about this.
[9] **THE COURT:** I could tell you that I have a fairly firm
[10] suspicion that if the rate set by the Court in this proceeding
[11] is correct to the penny, it's going to be because of a false
[12] accuracy, not because of a meritorious reason.
[13] **BY MR. RICH:**
[14] **Q.** A few general questions on JX 1293, this big chart of all,
[15] reporting by all CMS services which is in your binder. You
[16] have it I think right in front of you.
[17] **A.** Yes, I do.
[18] **Q.** This depicts the average per location rates across all
[19] commercial services licensed by BMI, is that correct?
[20] **A.** That is correct.
[21] **Q.** Large and small?
[22] **A.** Yes.
[23] **Q.** Including the likes of Carolina Georgia Sound?
[24] **A.** I'm sure they're on here.
[25] **Q.** Here it is. We're just blowing up that piece of it. Do

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[1] you see Carolina Georgia Sound, that piece there?
 [2] **A.** Yes, I do.
 [3] **Q.** Can you swing over to see what the per location rate for
 [4] the contract year, this is July 1, '08. Is that the year
 [5] that's up there? Is that a correct depiction of their per
 [6] location rate is \$416.28?
 [7] **A.** Again, Mr. Rich, can you tell me what page that's on? I
 [8] just want to be able to go through.
 [9] **Q.** The second to the last page.
 [10] **A.** Thank you.
 [11] **Q.** Do you see it?
 [12] **A.** Yes, I do.
 [13] **Q.** Is that correct, 416.28?
 [14] **A.** Yes. They started the year with 2,015 locations. They
 [15] ended the year with 176 locations. So they lost close to 1800
 [16] locations, and their base fee was 73,000 and that would be the
 [17] effective rate, 416 per location.
 [18] **Q.** And they were remitted to having to pay that rate?
 [19] **A.** Yes, they were.
 [20] **Q.** That includes something called Great Plains Sound and
 [21] Technologies on the same page down a bit?
 [22] **A.** Yes, I see that.
 [23] **Q.** Could you read into the record their effective rate
 [24] beginning July 1, 2008?
 [25] **A.** Great Plains' effective rate was \$594.64.

[1] this chart when you tote it all up and you do the big average
 [2] at the bottom, you come up with a number of \$34.50 a location
 [3] on average across large and small, Great Plains and Muzak and
 [4] the whole group, yes?
 [5] **A.** \$34.52.
 [6] **Q.** \$34.52?
 [7] **A.** I don't want to be off on that.
 [8] **Q.** With respect to his Honor we'll stay to the penny here for
 [9] the moment.
 [10] **THE COURT:** When a customer loses a location, as
 [11] demonstrated here, is that location characteristically picked
 [12] up by another customer or does it vanish from sight?
 [13] **THE WITNESS:** Our understanding, your Honor, is that
 [14] it's a lot of cannibalism internally within that industry. So
 [15] if one loses another one gains. That's what we've seen.
 [16] **THE COURT:** The location doesn't go out of existence,
 [17] it simply comes under different ownership characteristically.
 [18] **THE WITNESS:** If another service in the industry
 [19] purchased it or acquired it, it comes under the organic growth
 [20] calculation, but the old business still pays us at the higher
 [21] effective rate.
 [22] **Q.** So in that situation, if Great Plains Sound and
 [23] Technologies lost an account for which it was paying nearly
 [24] \$600, and that account was acquired by TruSonic, BMI would then
 [25] receive \$24.75 on the last year if that happened during the

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[1] **Q.** And they were remitted to paying that too, correct?
 [2] **A.** Yes, they were.
 [3] **Q.** Now, the data from which this chart was constructed apply
 [4] to licenses whose termination dates are pretty uniformly the
 [5] end of June of 2009, correct?
 [6] **A.** That is correct.
 [7] **Q.** And whose start dates are as early as but no earlier than
 [8] July 1, 2004, is that correct?
 [9] **A.** Yes.
 [10] **Q.** So this chart doesn't reflect whether there were
 [11] simultaneous settlements of prior open periods with any of this
 [12] group of licensees, correct?
 [13] **A.** If the licensees were in existence prior to July 1 of 2004,
 [14] it doesn't reflect. They were all treated equally. We settled
 [15] that period of time anything prior to 2004 at what interim fees
 [16] they paid became final.
 [17] **Q.** I'm simply asking whether this chart and the column R
 [18] analysis in any way reflects the resolution of any prior
 [19] periods with any of the listed entities which were
 [20] simultaneously entered into, the resolution of those prior
 [21] periods, at the time the licenses for which you depict the
 [22] economics appears here.
 [23] **A.** No, this chart only explores the five years of the current
 [24] license.
 [25] **Q.** Right. Now, even with that, I take it BMI's take-away from

[1] last year of the TruSonic agreement for that account?
 [2] **A.** Yes, we would. Again, Mr. Rich, if it exceeded the
 [3] 8 percent. If it was under the 8 percent, it would be
 [4] considered under the cushion, so we wouldn't receive anything.
 [5] **Q.** Right, right. Now, notwithstanding that the bottom line of
 [6] this opum magnus here, this 1293 is \$34.50, I take it BMI's
 [7] position in this Court, putting aside option values and
 [8] premiums, is that our client, DMX, should pay \$36.36 per
 [9] location, is that correct?
 [10] **A.** That is correct.
 [11] **Q.** Now, if DMX acquired TruSonic, or if it acquired Play
 [12] Network, if it had, I should put in the word had, as of July 1
 [13] of 2008 -- with me so far?
 [14] **A.** If DMX --
 [15] **Q.** DMX had acquired TruSonic as of July 1, 2008, for the year
 [16] ended June 30, 2009, meaning for that succeeding twelve months,
 [17] am I correct that DMX would have paid \$24.75 for each of the
 [18] TruSonic locations it would have acquired?
 [19] **A.** I am not quite sure how that would work, since DMX wasn't
 [20] under this agreement. I'm not sure if DMX could say that those
 [21] locations now fall under the auspices of the rate court action
 [22] so we're going to pay \$25 per location.
 [23] **Q.** Very fair question. I should have been more precise. Had
 [24] DMX been operating under the standard CMS industry form
 [25] license, which you seek here to place DMX under, would my

[1] hypothetical be correct in that circumstance, its acquisition
[2] of TruSonic in the period July 1, 2008 through June 30, 2009
[3] would have required DMX pursuant to that form of license to pay
[4] BMI \$24.75 with respect to each of the acquired TruSonic
[5] locations?
[6] **A.** Yes, that is correct.
[7] **Q.** But under BMI's proposal for DMX here, DMX would pay \$36.36
[8] for its own locations over that period, correct?
[9] **A.** Again, we thought that was a -- we offered DMX the same
[10] concept of this license as everybody else, but we knew that at
[11] this point in time DMX's effective rate would have been north
[12] of the 36.36, so we offered them the 36.36 as what we believed
[13] a reasonable rate, so that would be correct, they would be
[14] paying at the 36.36.
[15] **Q.** And what distinction does BMI see and do you see as BMI's
[16] head of licensing in the value of the BMI music used in that
[17] circumstance between a DMX location paying 36.36 and an
[18] acquired TruSonic location paying \$24.75 or a nearly 50 percent
[19] premium for the DMX locations? What's the economic rationale
[20] for that, if any?
[21] **A.** I'm not sure if there is an economic rationale for that.
[22] There's a contractual rationale for that, that the contract
[23] called for that to happen and that's what we agreed to.
[24] **Q.** If GE had come along and acquired TruSonic, covering the
[25] same period, so the deal closes July 1, 2008, okay? For that

[1] year, is it not accurate that GE would have paid \$24.75 per
[2] location for the TruSonic locations it would have acquired?
[3] **A.** Is GE operating in the space under a current license
[4] agreement?
[5] **Q.** Assume GE signs your standard form.
[6] **A.** Again, anybody signing our standard form would operate
[7] under that way, that they would acquire that service at \$24.74,
[8] which was the effective rate.
[9] **Q.** And if DMX were operating under the standard form and GE
[10] came along and acquired DMX effective the same date, I take it
[11] they would be required to pay \$36.36 for the same locations,
[12] for the DMX locations?
[13] **A.** Per the contract, yes.
[14] **Q.** Now, did I understand your direct testimony to indicate
[15] that TruSonic and maybe your testimony a few minutes ago, and
[16] Play Network at the present moment are licensed on an interim
[17] basis at \$25 a location?
[18] **A.** Yes, they are.
[19] **Q.** That's a function of BMI's observance of the interim fee
[20] ruling in place here?
[21] **A.** Correct.
[22] **Q.** In your estimation and knowing this business as well as you
[23] do, are those entities apt to voluntarily agree to paying
[24] \$36.36 a location as a final fee matter for the period from
[25] July 1 of this year -- of '09 forward, the unlicensed or the

[1] not finally licensed period?
[2] **A.** I think it would be part of the negotiation that we would
[3] be seeking with them.
[4] **Q.** I'm asking you knowing the business people, knowing the
[5] business, knowing the business experience, knowing the license
[6] fee experience, do you think it's likely that in a voluntary
[7] face-to-face negotiation, TruSonic or Play Network would say
[8] sure, we'll give you a 50 percent increment over the per
[9] location rates we have been paying in order to close a deal
[10] beginning July of '09?
[11] **MR. FITZPATRICK:** Could I just object, your Honor?
[12] Just the hypothetical is incomplete because it doesn't include
[13] whether the court would have ruled or we're assuming there's no
[14] ruling in this case in the hypothetical?
[15] **MR. RICH:** I'm assuming in the free marketplace, no
[16] Court ruling.
[17] **Q.** Do you think it's likely?
[18] **A.** I think we would be seeking 36.36.
[19] **Q.** Do you think it's likely they'd agree? You know this
[20] business. You know them.
[21] **A.** I'm sure if you were their counsel, they wouldn't agree
[22] with me.
[23] **Q.** Assume I wasn't. Even assuming I wasn't.
[24] **A.** We would be seeking it. I'm not sure if they would,
[25] Mr. Rich, or not. They agreed to the original increase off the

[1] 12 or \$14 per location rate. We would be seeking potentially
[2] higher than the 36.36 rate. I'm not really sure of that
[3] dynamic because we haven't even gotten to that point yet.
[4] Knowing the parties, we would be starting higher, they'd be
[5] starting lower and hopefully we'd end up somewhere in the
[6] middle.
[7] **Q.** Are you aware of any material changes in TruSonic or Play
[8] Network's use of the BMI repertoire that would warrant a
[9] 50 percent rate increase?
[10] **A.** No, I'm not.
[11] **Q.** Any other business elements affecting TruSonic and Play
[12] Network as you understand them that would warrant a 50 percent
[13] rate increase?
[14] **A.** On those two, no, I'm not.
[15] **Q.** Let's turn to some cost issues from your direct testimony,
[16] if we can. Am I correct, sir, that --
[17] **THE COURT:** Mr. Rich, I hope that in your closing
[18] argument or somewhere along the way you will give attention to
[19] the concept that is increasingly bothering me, and that is
[20] whether these anomalies and disproportions in the per location
[21] payments that you've been parading are really significant to a
[22] process of rate setting across the board, or whether they
[23] demonstrate no more than the fact that if when you're setting
[24] rates that yield finite amounts, steady amounts of money on a
[25] varying base in the population of the amount of locations held,

[1] there is always going to be anomalies and disproportions
[2] because the money remains equal and the number of locations
[3] fluctuates, and perhaps that's an argument for setting the rate
[4] in a different way than by reference to locations, because of
[5] these fluctuations and discrepancies.

[6] But if that is the best way to set the rate, then
[7] those fluctuations and anomalies have to be accepted as part of
[8] life. You see what I'm getting at?

[9] **MR. RICH:** I do, your Honor. The limitations here --

[10] **THE COURT:** It's the consequences of what you've been
[11] playing with this morning. I say that with great respect, but
[12] it is a series of manipulations and demonstrations, each of
[13] which is local and finite in nature. What is the conclusion to
[14] be drawn from that display?

[15] (Continued next page)

[1] **MR. RICH:** We will be happy to have a dialogue about
[2] it and argue about it and to ultimately brief it, your Honor.
[3] The limitation -- I understand your point.

[4] First of all, though, these are three of the most
[5] major competitors, more so than Muzak for our client, and so it
[6] is critically important that the Court understand the real term
[7] real world economics of contemporaneous arrangements with three
[8] competitors at least two of whom are considered much more
[9] significant competitors for DMX than even Muzak is, as you will
[10] hear on the direct testimony of our own witnesses. Point one.

[11] Point two. Your Honor, these are not simply fixed
[12] flat fee deals which commonly occur. Let's say that the
[13] broadcast television networks have historically entered into
[14] fixed fee deals and everybody is taking a gamble which I think
[15] is your implicit point that revenues may go up in the term of
[16] the license, they may go down. By analogy, locations might go
[17] up, locations might go down. If it were solely a fixed fee,
[18] say the Muzak license at \$6 million, or the TruSonic or Play
[19] Networks licenses reflecting their smaller scale at lesser
[20] levels, there would be considerable force to your Honor's view.
[21] However, that's not how these licenses in fact operate because
[22] once those 8 percent growth allowances have been exceeded as
[23] was the case for these three key competitors, they pay
[24] significantly more dollars to BMI than the starting dollars.
[25] And the key question I have been trying to get at maybe not

[1] very well is at what rate --

[2] **THE COURT:** At what?

[3] **MR. RICH:** At what rate do they pay more? And what
[4] these contracts contemplate is the rate at which they pay more
[5] continues to ratchet downward until you reach \$24.75. It
[6] wasn't as if they keep paying at or about \$36.36. Built into
[7] the contracts was the right, expectation, and assumption on
[8] BMI's part that it would be reasonable that if these people
[9] continue to grow they get a freebie of 8 percent in a given
[10] year but that's it. As soon as you go to 8.1 percent, 8.01
[11] percent, you pay more. But the key is you don't pay more at
[12] the \$36.36 bogey, you pay considerably less, as much as \$12,
[13] almost, less by the last year, as is demonstrated, so that by
[14] the last year TruSonic and Play Network, which grew
[15] considerably. If you look at 1293 you see their base location
[16] counts, your Honor, grew considerably, but so did their license
[17] fees to BMI.

[18] So, it is not as if it was a fixed contract saying
[19] we'll both take our chances. BMI knowingly built the license
[20] structure that allowed BMI to grow in income with these
[21] licensees but grow at a diminishing rate of recompense provided
[22] they had success. And that's what I've been trying to elicit,
[23] which is that those who actually did grow at that larger level
[24] were being incrementally taxed as if it was a progressive tax
[25] system, your Honor, at lower and lower annual per location

[1] rates. We will argue to you that that's highly probative of
[2] when a reasonable fee is, even putting aside the direct license
[3] data we haven't gotten to yet, even if you were to principally
[4] examine the experience under the CMS industry licenses.

[5] **THE COURT:** But in my interim fee decision I
[6] recognized that there was evidence tending to show that BMI
[7] contemplated and accepted the notion that something on the
[8] order of \$24.75 would be a reasonable fee, rate.

[9] **MR. RICH:** Yes.

[10] **THE COURT:** And it seems to me that that comprehended
[11] a great deal of what you are trying to spend so much time in
[12] the intricacies of.

[13] Now, I understand that you are adding to that the fact
[14] that it actually happened in fact with two big participants.
[15] Of course that has probative force. But, does it require the
[16] kind of intricacy that you are going through?

[17] **MR. RICH:** No. And had BMI stipulated to the
[18] correctness of your interim fee, being a little facetious, I
[19] wouldn't be going through this. It is because they are pushing
[20] back as they are entitled to, your Honor, so very hard on that
[21] interpretation they're denying, in a sense --

[22] **THE COURT:** I'm trying to find out whether what I've
[23] been listening to adds anything to the understanding that I had
[24] a few years ago when I was addressing the interim fee.

[25] **MR. RICH:** It is designed solely to reinforce exactly

[1] your understanding, your Honor. And if I overburdened it, I
[2] apologize.

[3] **THE COURT:** Well, I'm sure I should be very grateful
[4] but, frankly, it leaves me confused about the purpose of this
[5] because the point still remains.

[6] **MR. RICH:** The point does remain.

[7] **THE COURT:** Okay. All right.

[8] **MR. RICH:** And it is a little belt and suspenders.

[9] **THE COURT:** Let's tip-toe towards --

[10] **MR. RICH:** As I said to the parties, reasonable
[11] anticipation of BMI suffices since they have agreed. I have
[12] spent more than an hour, I fear.

[13] **THE COURT:** Almost a day.

[14] **MR. RICH:** I apologize -- that establishing in reality
[15] not only in expectation those levels were reached.

[16] **THE COURT:** This chart I understand.

[17] **MR. RICH:** Thank you. We are moving on.

[18] **Q.** Costs. I take it that in fiscal year 2008, Mr. O'Neill,
[19] BMI topped some \$900 million in revenues, is that correct?

[20] **A.** That is correct.

[21] **Q.** I would like to show you what has been premarked as Joint
[22] Exhibit 1263, please.

[23] You recognize this as a BMI press release?

[24] **A.** Yes, I do.

[25] **Q.** Dated August 25, 2008?

[1] **A.** Yes, I do.

[2] **Q.** And it reports, both in its headline and in the text in the
[3] first paragraph, that BMI had topped the \$900 million mark for
[4] that fiscal year; yes?

[5] **A.** Yes.

[6] **Q.** Okay.

[7] And the same release indicates that BMI distributed
[8] royalties of some \$786 million to its songwriters, composers
[9] and music publishers; is that correct?

[10] **A.** That is correct.

[11] **Q.** And the same press release makes reference to the sums
[12] collected on account of domestic licensing income. Do you see
[13] that in the third paragraph toward the bottom?

[14] **A.** Yes, I do.

[15] **Q.** And the same press release, I believe it is on the second
[16] page in the third to the last paragraph, claims to have lowered
[17] its overhead, BMI, to 11.7 percent, what it terms the lowest in
[18] the company's history --

[19] **A.** I see that, yes.

[20] **Q.** -- do you see that?

[21] Now, even though the press release makes reference to
[22] what it terms an impressive \$664 million in domestic licensing
[23] income, it doesn't anywhere indicate, does it, that BMI applies
[24] a 47 percent higher overhead rate than 11.7 percent, namely
[25] 17.2 percent to these domestic license receipts. Is that

[1] correct?

[2] **A.** The 47 percent, Mr. Rich, that's the delta between the --

[3] **Q.** 11.2 -- 11.7 and 17.2, if my math is right.

[4] **A.** No, it doesn't.

[5] **Q.** Is this higher overhead figure the domestic figure publicly
[6] announced by BMI anywhere?

[7] **A.** No, it is not.

[8] **Q.** Isn't it a matter that would be of great interest to, among
[9] others, BMI's own affiliates who are recipients of license
[10] income?

[11] **A.** I don't know the answer to that.

[12] **Q.** Isn't it a matter of some competitive significance to BMI
[13] to identify what its -- how efficiently it is operating and
[14] what its overhead therefore is?

[15] **A.** I think for most writers and publishers they look at the
[16] overall number that's published. They don't get into details.

[17] In certain cases I know that publishers and composers and
[18] songwriters do know there is a higher administrative fee built
[19] in such as local television per program, they know there is a
[20] higher cost for that license and they know there is a higher
[21] administrative fee tacked on. I know that just from dealing
[22] with certain people but, in general, no, it is not well known.

[23] **Q.** No, but I take it it was not gratuitous that BMI put the
[24] 11.7 percent in the press release. They saw a benefit in doing
[25] that, right?

[1] **A.** Well I guess, again, the benefit would be our major
[2] competitor ASCAP.

[3] **Q.** And it would be less beneficial, would it not, to say,
[4] well, by the way, asterisk, when we distribute the bulk of our
[5] revenue, \$664 million out of seven hundred and some, we
[6] actually take out 17 percent.

[7] That wouldn't play as well, would it, in the public?

[8] **A.** Again, I'm not quite sure if they know that or not,
[9] Mr. Rich. I'm not sure how that would play in the public.

[10] **Q.** Now, BMI contends in this case that it is entitled to apply
[11] this unannounced domestic overhead rate to DMX in lieu of its
[12] announced 11 percent overhead rate in calculating what we have
[13] called the floor fee. Is that right?

[14] **A.** That is correct.

[15] **Q.** And that's because, as I understand it, the overall
[16] overhead rate is calculated against all BMI revenues including
[17] revenues associated with foreign performances?

[18] **A.** That is correct.

[19] **Q.** And therefore it is BMI's view that that figure understates
[20] the true cost to BMI of administering domestic performances by
[21] commercial music services?

[22] **A.** That is correct.

[23] **Q.** And so, consistent with that view, if I understand your
[24] testimony, when BMI administers its commercial music service
[25] licenses it keeps 17 percent, roughly, of the revenues it earns

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[1] and distributes the remaining 83 percent; is that correct?

[2] **A.** That is correct.

[3] **Q.** And so, you take that domestic overhead as a proxy for how

[4] to withhold attributable expenses for this industry; correct?

[5] **A.** Correct.

[6] **Q.** Do you keep any separate books or records as to the actual

[7] expenses incurred in running this part of BMI's business?

[8] **A.** No, we don't.

[9] **Q.** Now, how is that 17 percent figure calculated, to your

[10] knowledge?

[11] **A.** To my knowledge it's -- you have a sum certain of costs,

[12] expenses for the company, and you look at what the 3.6 of

[13] foreign income relates to how much that -- how much of those

[14] costs relate to that 3.6 percent. You also have higher

[15] administrative costs on certain licenses up to 20 percent. You

[16] look at what that 20 percent covers of those costs. Whatever

[17] is remaining is divided by the license fees that remain to come

[18] up with the 17 percent.

[19] **Q.** Which costs are treated by BMI as associated with

[20] administering and collecting foreign license fees and therefore

[21] are pulled out of that equation?

[22] **A.** 3.6 percent of the foreign revenues would be those costs.

[23] **Q.** What do they consist of?

[24] **A.** They consist of -- you mean in general?

[25] **Q.** No, my question is to your knowledge -- I take it this is

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[1] not something that you personally sit down and calculate as

[2] part of your responsibilities as BMI overhead, correct?

[3] **A.** That is correct.

[4] **Q.** And how familiar are you, in fact, with the derivation of

[5] that 17 percent as a matter of actual record showing, well, we

[6] will take X percent of this or Y percent of that operation.

[7] Have you ever studied that? Has anybody ever made a

[8] presentation to you about it?

[9] **A.** No, they haven't.

[10] **Q.** Sitting here today, do you have any basis to know what cost

[11] components are allocated to domestic versus foreign activities

[12] of BMI?

[13] **A.** I believe it is just simply a subtraction. If you start

[14] with a hundred million dollars of expenses, X percent of those

[15] expenses are attributed to foreign in terms of the 3.6 percent

[16] covers X percent, the 20 percent covers Y percent whatever is

[17] remaining. It is sum. All the expenses remaining are sum.

[18] That's my understanding of how we get to the 17 percent.

[19] **Q.** Does BMI have something called an international

[20] administration department?

[21] **A.** Yes, we do.

[22] **Q.** What is it?

[23] **A.** It deals with our 70 sister societies. I think there is

[24] 70, plus or minus.

[25] **Q.** I think your website says 80, if I am not mistaken.

[1] **A.** It could be 80. There have been new ones.

[2] **Q.** Could you explain to His Honor what that means?

[3] **A.** Yes.

[4] Throughout the world there are organizations like BMI

[5] in particular countries which are responsible for collecting

[6] license fees and distributing to their members. When a BMI

[7] work is performed in that country those societies pay that,

[8] those licensing fees back to BMI and we, in turn, distribute it

[9] to our affiliate.

[10] **Q.** Where is that? Is there a physical locale for the

[11] employees associated with that international administration

[12] department?

[13] **A.** They're spread out through BMI's organizations, some in

[14] Nashville, some in London, some in New York.

[15] **Q.** Do you know for a fact whether the cost of that operation

[16] are backed out of the numerator that would go into the

[17] determination of the 17 percent -- let me ask a better

[18] question.

[19] I take it that to get to the denominator to get to 17

[20] percent you take all of your revenues and you back out the

[21] foreign revenues; right?

[22] **A.** Correct.

[23] **Q.** Now, you said several times they also back out the costs

[24] for the numerator associated with the foreign stuff, right?

[25] Sitting here today -- correct?

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[1] **A.** I will correct that. If you took the foreign revenues of

[2] \$200 million and you applied 3.6 percent on that \$200 million

[3] the resulting cost, the resulting overhead would be removed

[4] from the expenses. It is not dollar for dollar for the

[5] international department.

[6] **Q.** Where did the 3.6 percent come from?

[7] **A.** We have a much lower administration charge for that 3.6

[8] percent because the foreign societies do, as I mentioned

[9] earlier, the negotiations with the licensees. They do the

[10] collection of the dollars from these establishments, they track

[11] the music use from these establishments, they have whatever

[12] discrepancies, resolutions overseas. They determine how much

[13] money is to be paid to BMI. They take out their overhead and

[14] then ship the dollars to BMI. BMI still has some

[15] administration on that but not nearly the amount we have

[16] domestically so we take a smaller overhead rate of 3.6 percent.

[17] How that came to be I don't know but that is what, as long as I

[18] have been here that's been 3.6 percent.

[19] **Q.** You don't know how closely or not it relates to the actual

[20] costs BMI incurs to receive the income it receives from its

[21] some 80 foreign affiliates, correct?

[22] **A.** That is correct.

[23] **Q.** And so sitting here today, for example, do you know what

[24] percent, if any, of the costs of running its international

[25] administration department go into that 3.6 percent?

[1] A. No, I don't.
 [2] Q. Do you know something -- have you ever heard of something
 [3] called Fast Track?
 [4] A. Yes, I have.
 [5] Q. Tell the Court what that is.
 [6] A. Its an international database which I'm not that familiar
 [7] with but this is my 30,000 foot view: An international
 [8] database which tries to generalize or standardize, I should
 [9] say, works and title registrations across all these various
 [10] societies.
 [11] Q. And so, that has an international component, correct?
 [12] A. Yes, it does.
 [13] Q. It is relevant to what BMI takes in in revenues from
 [14] foreign affiliates, correct?
 [15] A. It helps, yes.
 [16] Q. Are the costs associated with Fast Track baked into the 3.6
 [17] percent?
 [18] A. Again, not directly.
 [19] Q. Indirectly?
 [20] A. I believe it is indirectly.
 [21] Q. What is the basis for your knowledge?
 [22] A. Again, we are taking 3.6 percent overall to account for
 [23] expenses. That's my understanding, it covered the expenses of
 [24] BMI's licensing and reciprocal agreements with these 70 to 80
 [25] for foreign countries.

[1] Q. The last question on this topic. I take it BMI doesn't
 [2] simply rely on what your foreign affiliates report to be the
 [3] actual performances of BMI represented works in their
 [4] respective countries, correct?
 [5] A. Correct.
 [6] Q. You do some of your own monitoring, correct?
 [7] A. We do. I'm not quite sure how we do it, but I know there
 [8] is some auditing done.
 [9] Q. This is an area you don't know much about?
 [10] A. No, I don't.
 [11] Q. How much of that activity and the time and employee expense
 [12] associated with it is baked into this 3.6 percent cost
 [13] deduction?
 [14] A. I don't know.
 [15] Q. Last question on this subject. What portion of this 17.2
 [16] percent domestic overhead rate derived in the fashion you have
 [17] testified underwrites one or more contingency funds maintained
 [18] by BMI such as would finance special distributions to BMI
 [19] affiliates?
 [20] A. I don't know, Mr. Rich.
 [21] Q. If you turn to tab 8 of your direct license binder,
 [22] please -- your direct testimony binder, please?
 [23] A. Yes, sir.
 [24] Q. Do you remember testifying briefly about this demonstrative
 [25] yesterday?

[1] A. Yes, I do.
 [2] Q. I will let his Honor get ahold of it.
 [3] Now, am I correct that the purpose of this
 [4] demonstrative was to suggest that the administrative costs to
 [5] be incurred by the licensing and performing rights departments
 [6] in connection with administering a blanket carve-out license
 [7] will be something over \$150,000 a year?
 [8] A. For the licensing and performing rights, yes, for the two
 [9] departments.
 [10] Q. That's basically a guesstimate at this point, right?
 [11] A. That is correct.
 [12] Q. Involving tasks that have not yet been undertaken, correct?
 [13] A. That is correct.
 [14] Q. And including estimates based on operations of a
 [15] department, namely the performing rights department that you
 [16] don't even supervise; is that correct?
 [17] A. That is correct.
 [18] Q. So, just taking a single line entry here in the third
 [19] grouping: Resolve disputes regarding credits with DMX and MRI.
 [20] Do you see that?
 [21] A. Yes, I do.
 [22] Q. There is a title called Per Program Supervisor next to it
 [23] which is listed 375 hours?
 [24] A. Yes, sir.
 [25] Q. You can't really say sitting here today, can you, whether

[1] such a per program supervisor will spend 375 hours per year
 [2] resolving disputes with DMX or 300 hours or any other number;
 [3] right?
 [4] A. It is an estimate.
 [5] Q. And if that person were to end up working only 200 hours a
 [6] year is part of BMI's proposal in this case to send a refund to
 [7] DMX?
 [8] A. I believe that if the costs do not come out -- they would
 [9] be the incremental costs on top of the 17 percent that we were
 [10] talking about. I believe it comes to \$250,000 to get to the
 [11] \$751,000 in the base fee. I believe that we should explore if
 [12] those costs are not -- are too high that we would lower those,
 [13] or if they're too low we should be able to raise those. I
 [14] think there should be some type of resolution with DMX on that.
 [15] Q. Other than your oral testimony and this demonstrative, are
 [16] you aware of any data of any kind, single piece of paper, that
 [17] was provided to DMX to support any of these figures?
 [18] A. I believe there was a, again during discovery phases or
 [19] there was some papers back and forth between the attorneys
 [20] trying to justify some of these expenses, but.
 [21] Q. What do you recall?
 [22] A. I just recall having to do this estimate for them in
 [23] order -- was it an interrogatory response I believe we had to
 [24] send back to DMX? That's what I recall.
 [25] Q. Do you recall any business records that were shared

[1] supporting any single line item here?

[2] **A.** Not personally, no.

[3] **Q.** You have never seen any, I take it?

[4] **A.** Not -- I haven't had to share any, correct.

[5] **Q.** You did a work file with all the workups for this?

[6] **A.** Did I have a work file? Not a big work file. I think

[7] there was a file created by people who were asked to spec these

[8] things out.

[9] **Q.** Did you do any of the specking out?

[10] **A.** I did some of it. Yes, I reviewed them all.

[11] **Q.** You list a project team meeting. Is that literally a

[12] meeting?

[13] **A.** It is 25 hours throughout a year and I figured if you do a

[14] half hour, an hour a week or an hour every other week you are

[15] pretty much there in terms of catching up to speed on the

[16] issues of a brand-new license for BMI.

[17] **Q.** What travel expenses do you envision associated with making

[18] sure that a standard form of direct license whose terms are

[19] identical across all users actually was signed by the licensee?

[20] **MR. FITZPATRICK:** I just would object. The premise of

[21] that question is incorrect.

[22] **THE COURT:** Excuse me?

[23] **MR. FITZPATRICK:** The premise of the question is

[24] incorrect that terms are identical. If it is a hypothetical I

[25] don't object.

[1] per program license?

[2] **A.** Today?

[3] **Q.** Yes.

[4] **A.** I'm going to throw a dart. I think about 450, roughly.

[5] **Q.** 450, okay.

[6] We're talking here about a single licensee for the

[7] moment taking the blanket carve-out license, correct?

[8] **A.** That is correct.

[9] **Q.** Now, each per program, each of those 450 broadcasters

[10] submits monthly reports, is that correct?

[11] **A.** Yes, they do.

[12] **Q.** And, among other things, am I correct that each of those

[13] reports contains information relating to the different

[14] television programs and program episodes they broadcast?

[15] **A.** Yes, they do.

[16] **Q.** The revenues associated with each program and episode?

[17] **A.** Yes, they do.

[18] **Q.** Music cue sheets for locally produced programming?

[19] **A.** Yes, they do.

[20] **Q.** And, last, where those stations themselves may have entered

[21] into source or direct licenses, copies of those or information

[22] relating to those, correct?

[23] **A.** Yes, they do.

[24] **Q.** Quite a bit more data to process than with respect, simply,

[25] to the DMX experience, no?

[1] **MR. RICH:** I will rephrase, your Honor.

[2] **BY MR. RICH:**

[3] **Q.** What does the \$10,000 in travel expense envision?

[4] **A.** Again, that comes from my experience in per program where

[5] the license was launched we had to attend a couple of industry

[6] conventions in order to explain the per program license. We

[7] had to -- I assume there are two major -- major commercial

[8] music services conventions that we will have to attend to

[9] explain how the adjustable fee blanket license will be working

[10] with DMX, how it all pans out. There will be publisher

[11] meetings that we will have to attend, I'm sure.

[12] That's where the \$10,000 came from.

[13] **Q.** So BMI's position, at least in this court, is that by being

[14] required to offer a form of license required by its decree,

[15] BMI's travel expenses to industry conventions to explain the

[16] workings of that Court ordered license should be borne by the

[17] applicant who was successful in achieving that license?

[18] **A.** It is an incremental cost of administering this license

[19] which we didn't have under the blanket so, yes, I would say

[20] this is a cost that we didn't occur under the standard blanket

[21] license.

[22] **Q.** You made reference to the broadcast per program rate,

[23] correct?

[24] **A.** Yes, sir.

[25] **Q.** How many local television stations operate under the BMI

[1] **A.** I don't know if it is because DMX has so many customers, I

[2] believe 75,000 locations. I'm not sure how the information

[3] will come into BMI.

[4] **Q.** Let's turn to tab 14 of the binder, please.

[5] Your Honor, I don't know if you want to break at some

[6] point for midmorning break?

[7] **THE COURT:** I wasn't sure how you were coming.

[8] **MR. RICH:** I'm moving along and am about to finish

[9] this segment. Well, this might be a good time for a break.

[10] **THE COURT:** The question that is raised in DMX' brief

[11] and towards which Mr. Rich is heading is why should all the

[12] expenses of developing and administering a new form of lease be

[13] inflicted on the first person to apply for it.

[14] **THE WITNESS:** Again, we are looking at just the -- the

[15] 17 percent is the standard administration charge. That would

[16] say that regardless of what license you take you should at

[17] least cover the 17 percent as Muzak or Play Networks or

[18] TruSonic do now. The incremental value of that, I believe

[19] their fees are much higher than what we've stated here. We've

[20] had developmental costs, we've had computer cost. This is just

[21] the incremental value we deemed that we are going to have to

[22] focus on DMX for this license. The concept should be --

[23] **THE COURT:** The additional costs are institutional in

[24] the sense of being spent to get the form of lease operated, the

[25] new lease.

[1] **THE WITNESS:** Yes, that's true. But if you had a
[2] composer who has performed on DMX and BMI had to incur more
[3] costs to administer that license versus a, the same composer's
[4] performance on Muzak and he had less cost on Muzak because of
[5] the blanket license, should he make any less for that same
[6] performance? And our feeling is if you cover your cost, the
[7] composer is then held steady. He is no worse off on either
[8] service in this industry.

[9] **THE COURT:** Okay. Let's take a 10 minute recess.
[10] (Recess)

[11] **BY MR. RICH:**

[12] **Q.** Mr. O'Neill, if you would turn to the exhibit located at
[13] tab 14 of your direct examination binder that's a document now
[14] in evidence as PX 126?

[15] **A.** Yes, sir.

[16] **Q.** Do you remember you gave some testimony about this
[17] yesterday?

[18] **A.** Yes, I did.

[19] **Q.** When were these charts created?

[20] **A.** There is a date stamp on here of -- I don't know the exact
[21] date they were created.

[22] **Q.** Did you have any involvement in their creation?

[23] **A.** No, I didn't.

[24] **Q.** Do you know when this data was first supplied to DMX?

[25] **A.** No, I don't.

[1] **A.** Yes, it is.

[2] **Q.** Was this analysis done, to your knowledge, back in 2002?

[3] **A.** I don't think it could have been done in 2002 for 2005.

[4] You mean an analysis like this?

[5] **Q.** Yes.

[6] **A.** No, sir.

[7] **Q.** Did your economist and you discuss how it could be that
[8] data created three years after the deal was done could be of
[9] use to this Court in interpreting what premium value the
[10] parties, three years earlier, put on their activities?

[11] **A.** I had no discussions with the economist.

[12] **Q.** Now, I take it that the information on here -- let me ask
[13] you a question. The middle -- the middle data entry, the
[14] heading of it is total identified show hours. Do you see that?

[15] **A.** Yes, I do.

[16] **Q.** What is that?

[17] **A.** Those are the identified show hours from Tribune data.
[18] That's a company which provides program information, what
[19] actually aired on local stations, and this is the total
[20] identified show hours from that.

[21] **Q.** Is this every program they gave you?

[22] **A.** I believe every program that we were able to identify that
[23] they gave us.

[24] **Q.** Or is this every program for which you were able to
[25] identify and locate a music cue sheet?

[1] **Q.** What backup for this data have you seen?

[2] **A.** No backup for this data.

[3] **Q.** What purpose was this created for?

[4] **A.** I believe it was created to help the economists verify the
[5] premium within the television per program license.

[6] **Q.** And what's your recollection of when the terms of that
[7] television license were entered into? When was that deal done,
[8] last final license deal?

[9] **A.** The last final license deal for BMI and the local
[10] television industry?

[11] **Q.** Yes.

[12] **A.** It expired in -- December 31st of 2004 was the last final
[13] deal. I don't quite know the start date of that, it just
[14] slipped my mind. It was about five years.

[15] **Q.** I was asking if it was negotiated and concluded in 2002.
[16] Does that sound about right?

[17] **A.** It does.

[18] **Q.** So, if I understand the purpose of this exercise, it was to
[19] provide your economist in this litigation with some data; yes?

[20] **A.** Yes, sir.

[21] **Q.** Designed to interpret the so-called premium value
[22] associated with a deal that was done back in 2002?

[23] **A.** That's my understanding, yes.

[24] **Q.** And for that purpose data was prepared reflecting
[25] television industry activity as of 2005? Is that what this is?

[1] **A.** I believe it would be every program we were able to -- I
[2] don't know -- quite know the answer to that, Mr. Rich.

[3] **Q.** The answer could be quite important, would it not, to
[4] interpreting this data?

[5] **A.** Yes, it could.

[6] **Q.** Because, in fact, BMI retains cue sheets for -- what -- 60
[7] percent for all local television, give or take, roughly?

[8] **A.** I think our coverage is, again, if you look at the total
[9] universe of programs it would be about 60 percent. A lot of
[10] that is the balance. The 40 percent we don't have is due to
[11] paid programming for the most part where it is listed as the
[12] data will come to us from Tribune listing paid programming, not
[13] actually the program that was aired so we don't -- we're not
[14] able to match something up against that.

[15] **Q.** So, if we don't know the universe figure, namely there,
[16] under an old principal of garbage in garbage out, we don't
[17] really know the percentage of which derives from taking the
[18] first column as the numerator and the second column as the
[19] denominator because sitting here today you don't know what the
[20] denominator represents, correct?

[21] **A.** Again, my understanding was it was total identified show
[22] hours. I'm not sure if that meant, as you suggested, from a
[23] cue sheet or from -- that we were able to identify the program
[24] name to --

[25] **Q.** You don't know.

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[1] A. I don't know.

[2] Q. And the Court has been provided with no explanation that
[3] would elucidate that, correct?

[4] A. At this point -- no, I don't know the answer to that
[5] question, Mr. Rich.

[6] Q. Now, in your extensive history with the local television
[7] industry, is it conceivable to you that 85 percent or more of
[8] all local programs BMI has secured music use information
[9] concerning, as this would imply, the third row, that's not
[10] true, is it?

[11] A. I would say there is a good portion of local programming.
[12] Again, local is news, public affairs, religious, anything the
[13] local station produces. I would say that is probably --
[14] correct, we wouldn't have 86 percent of cue sheets representing
[15] total programs.

[16] Q. Which suggests that this universe in the second --
[17] represented by the data in the second column is a universe
[18] solely of those shows for which BMI maintains any music use
[19] data, correct?

[20] A. That would make sense.

[21] Q. So it is a subset of a universe which has not been sampled,
[22] correct?

[23] A. If that is the case it would be total identified show hours
[24] for which we had a cue sheet. It would be the center column.
[25] It wouldn't represent the total universe of programming.

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[1] Q. Was that qualification discussed with BMI's economist when
[2] this data was provided to him?

[3] A. I'm not sure.

[4] Q. By definition, if this data was created in 2005 it wasn't
[5] discussed or the topic of discussion when the television
[6] industry representative sat down with BMI in 2002, correct?

[7] A. Correct, this was not discussed at 2002.

[8] THE COURT: Mr. Rich, are these questions better
[9] reserved for the economist when you see what use, if any, he
[10] makes of this chart?

[11] MR. RICH: I think we will be in a catch-22, your
[12] Honor, because I expect Dr. Owen will say I relied on the data
[13] provided to me by Mr. O'Neill and his colleagues. It was what
[14] it was. They represented it to be this.

[15] He didn't generate it, it was handed to him by BMI, as
[16] we understand it.

[17] THE COURT: You haven't taken his deposition?

[18] MR. RICH: We have, but this was only provided to us
[19] about a week ago, your Honor.

[20] THE COURT: I see.

[21] MR. RICH: Without backup.

[22] THE COURT: Your colleague is gesticulating.

[23] MR. MARKS: Let me just correct the record on that
[24] point. This document was first provided to us as part of a
[25] package of materials relied upon by Dr. Owen. We did have the

[1] opportunity to --

[2] MR. RICH: Beg your pardon --

[3] MR. MARKS: -- to depose him on it but he testified --
[4] and we can explore it with him during his cross-examination
[5] here at trial -- that he didn't create the chart, it was simply
[6] handed to him by BMI.

[7] MR. RICH: Apologies for the misstatement, your Honor.

[8] THE COURT: Well, he is saying that he relied on it.
[9] Of course it is so broad as to be almost useless. The question
[10] is what did he understand it to be and that he was relying on,
[11] what was its meaning and significance and how was this
[12] conclusion supported by it. And if you went into that with
[13] him, I can understand it. If you didn't, then I suppose you
[14] have to do it by some other witness who knows nothing about it.

[15] MR. MARKS: We have explored and will explore with
[16] Dr. Owen how he uses it. What we are exploring with
[17] Mr. O'Neill is what actually this data is, who created it and
[18] what it in fact represents because I don't think that that's
[19] within Dr. Owen's personal knowledge since he accepted this
[20] information at face value.

[21] THE COURT: It doesn't seem to be very clear within
[22] Mr. O'Neill's knowledge either.

[23] MR. RICH: I agree, your Honor. And I'm proposing to
[24] move on from here.

[25] BY MR. RICH:

[1] Q. Mr. O'Neill, toward the end of your direct examination
[2] yesterday you described what you referred to as an internal
[3] analysis that BMI conducted comparing the percentage of
[4] directly licensed performances on the DMX off-premise or
[5] satellite channels with the percentage on the on-premise
[6] channels.

[7] Do you recall being asked some questions and giving a
[8] few answers there?

[9] A. Yes, I do.

[10] Q. What was the basis of the information you testified to
[11] there yesterday?

[12] A. The report was generated by a colleague of mine, Milt
[13] Laughlin who I believe is testifying at this trial, and it was
[14] supplied based on the data supplied to DMX by BMI.

[15] Q. Do you know when that analysis was run, when it was
[16] performed by Mr. Laughlin?

[17] A. I don't know the exact dates, Mr. Rich. I believe it was
[18] fairly recently.

[19] Q. And, have you seen any of the underlying data supporting
[20] the analysis?

[21] A. No, I have not.

[22] Q. Did you discuss any of that with Mr. Laughlin?

[23] A. Yes, I did. I asked questions about why a savings rate for
[24] DMX would drop from 38 percent or 35 percent. I'm not quite
[25] sure of the number. It was in that range down to 20, 22